

ORIGINAL
RECEIVED

JAN - 6 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Implementation of the)
Telecommunications Act of 1996)
)
Amendment of Rules Governing Procedures)
to Be Followed When Formal Complaints)
Are Filed Against Common Carriers)

CC Docket No. 96-238

DOCKET FILE COPY ORIGINAL

COMMENTS OF BELL ATLANTIC¹

I. Introduction and Summary

Bell Atlantic supports the Commission's goal of streamlining its formal complaint rules to enable it to meet the tight decision deadlines established in the Telecommunications Act of 1996 ("1996 Act").² The statutory requirement to decide all formal complaints within five months or less will require that parties adhere to expedited schedules and streamlined processes; just as importantly, however, it will magnify the need to weed out frivolous complaints that are designed either for harassment or merely as "fishing expeditions" to obtain broad discovery.

Bell Atlantic proposes several modifications to the Commission's proposals designed to help expedite complaint resolution and to bring the proposed rules into compliance

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

² *See Notice of Proposed Rulemaking*, FCC 96-460 (rel. Nov. 27, 1996) ("Notice").

No. of Copies rec'd 049
List ABCDE

with the Act. In particular, Bell Atlantic urges the Commission to require that the complainant provide the defendant with a statement of the nature and basis of the dispute before filing the complaint, along with a list of the materials that it would consider directly relevant to resolving the dispute. The defendant will need to respond to the complainant's concerns within a reasonable period of time and should be encouraged to provide relevant materials at that time. Such expanded pre-filing correspondence should help facilitate settlement or at least narrow the scope of the complaint and any remaining discovery. The parties should also be able to submit more robust initial filings, avoiding the need for expansive briefing.

The Commission may not, however, truncate the statutory provisions relating to cease and desist orders. Contrary to the Commission's tentative findings, the Communications Act sets out the procedures that must be followed before such orders may be issued, and nothing exempts cease and desist orders issued in the context of complaint proceedings from their scope.

II. Pre-Filing Procedures Should Be More Robust.

The Commission proposes to require a complainant to "certify that it discussed, or attempted to discuss, the possibility of a good faith settlement with the defendant carrier's representative(s) prior to filing the complaint."³ Bell Atlantic agrees that such pre-filing contact between parties could moot the need to file a complaint, or at least narrow the issues. Adding a requirement for more even more extensive pre-filing activity, however, will increase the

³ *Id.* at ¶ 28.

possibility of settlement, eliminate or reduce discovery, narrow or eliminate briefing, and help expedite a decision.⁴

The Commission should require that the potential complainant, prior to filing a formal complaint, submit to the potential defendant a letter setting out the nature and basis of the claim in sufficient detail that the defendant can provide a meaningful response. The complainant should also be required to specify what materials it would consider to be directly relevant to the dispute. Within a reasonable time (to be negotiated between the parties), the defendant should be required to respond to the substance of the complainant's letter. That response must be more than simply a general denial; it must address all material allegations. The defendant should be encouraged to append documents to its response, in order to reduce or eliminate discovery.

Requiring more extensive pre-filing activity than proposed in the Notice will force the parties to address the issues in dispute and may result in settlement or narrowing of the disputed issues. If a complaint is filed, the defendant should be able to frame a complete answer and develop supporting facts and legal arguments within the proposed twenty day period after the complaint is filed.⁵ More robust initial pleadings will also help the Commission reach a decision within the prescribed period.

⁴ Proposed rule language to implement Bell Atlantic's proposals appears in the Attachment.

⁵ Notice at ¶ 47.

III. Briefs Should Be the Exception, Not the Rule.

The Commission asks whether briefs should be filed as of right in all cases, only in cases where there is discovery, or only upon order of the Commission staff, and whether there should be a standard page limit.⁶ Under Bell Atlantic's proposed pre-filing procedures, parties will have sufficient notice of the nature and basis of the complaint to argue the legal issues fully in the complaint and answer. There should rarely be a need for briefing, and any issues to be briefed should be narrow. Therefore, briefs should not be permitted as of right. Instead, the staff, at the initial status conference, should determine what issues, if any, need to be briefed and establish a schedule and page limits.

IV. Pleading Requirements Should Not Unreasonably Increase the Parties' Administrative Burden.

The Commission appropriately proposes that all pleadings be complete, detailed, and supported with documentation and affidavits.⁷ The Commission should summarily dismiss complaints that fail to state a *prima facie* case and prohibit amendments designed to cure defects in the initial complaint. The additional information proposed to be included in any complaint, answer, or authorized reply should be narrowed, however. The Notice proposes that each contain "(1) the name, address and telephone number of each individual likely to have discoverable information relevant to the disputed facts ... and (2) a copy of, or a description ... of all

⁶ *Id.* at ¶¶ 81-83.

⁷ *See id.* at ¶¶ 37, 39.

documents, data compilations and tangible things .. that are relevant to the disputed facts.”⁸ In a company with tens of thousand of employees, such a Bell Atlantic, this provision could be extremely burdensome, because there may be dozens or hundreds of persons who have some knowledge relevant to a broad complaint, and there could be thousands of pages of at least tangentially relevant documents. Moreover, rarely during a complaint proceeding does the Commission allow depositions or interrogatories to be served on particular individuals. Nor does the Commission generally permit broad document searches. Therefore, the proposed requirement adds a considerable burden. Furthermore, it is unlikely to expedite a decision, and may actually delay final action, because the time to identify all tangentially relevant documents and for the other party to request production of those that could have direct relevance to the case could be considerable.

Instead, the Commission should require the parties to identify, in their complaint or answer, up to five persons who have the most knowledge of the matter, and up to twenty relevant documents that have not already been submitted voluntarily. This number could be increased by staff order in a particular circumstance, upon motion.

V. Status Conferences Should Result in Rulings on Outstanding Procedural Issues.

Bell Atlantic agrees with the Commission’s proposal to conduct status conferences shortly after the answer is filed.⁹ The conference should determine whether any

⁸ *Id.* at ¶ 43.

⁹ *Id.* at ¶ 58. Any party’s request for a conference date other than the date set by rule should accompany the complaint or answer and indicate that the opposing party or parties have

briefing is needed and resolve all outstanding motions, including motions to dismiss defective complaints. At the end of the conference, the case should either be ripe for decision, or a short briefing schedule should result.

To memorialize rulings at the status conference, the Commission proposes that the parties in attendance be required to submit, within 24 hours, a joint proposed order for the Commission to adopt.¹⁰ Bell Atlantic suggests that the parties be given an opportunity to draft such an order on-site immediately after the conference and be given stenographic resources for this purpose. To facilitate the process, the Commission staff member or members who made the rulings should remain available for consultation.¹¹

VI. Cease and Desist Orders Must Use Section 312 Procedures.

The Notice includes a tentative finding that the procedures established in Section 312 for cease and desist orders do not apply to orders issued under Section 208, the formal complaint provision, or Section 274, relating to electronic publishing.¹² This tentative finding is incorrect under the Act. The justification in the Notice is that neither section cross-references

concurred with the change. If the Commission staff chooses to designate a different date, it should do so only after consulting the parties to minimize schedule conflicts.

¹⁰ *Id.* at ¶ 59.

¹¹ The Commission staff member should assist the drafting by confirming that the proposed order fairly represents the rulings he or she made at the conference or by suggesting appropriate changes.

¹² Notice at ¶ 60.

Section 312 and, therefore, Section 312 does not apply.¹³ However, the procedures established in Section 312 apply where “any person ... (2) has violated or failed to observe *any of the provisions of this Act*, ... or (3) has violated or failed to observe *any rule or regulation of the Commission authorized by this Act*.”¹⁴ There are no exceptions. Accordingly, the Commission must follow Section 312 procedures before issuing an order to cease and desist in the context of Section 208 or 274 proceedings.¹⁵

VII. Conclusion

The 1996 Act gives the Commission the difficult task of deciding formal complaints in a very compressed period of time. By placing increased pre-filing obligations on the parties, the Commission should be able to limit the number of formal filings and procedural disputes. Ideally, the issues will have been sufficiently narrowed and factual issues reduced or eliminated, so that the complaint and answer can themselves constitute all the

¹³ *Id.*

¹⁴ 47 U.S.C. § 312 (b) (emphasis added).

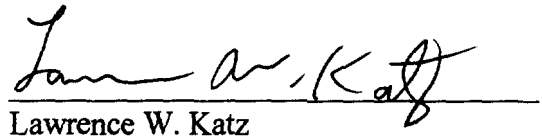
¹⁵ The Commission has recently confirmed that the Section 271(d)(6) enforcement provisions augment, and do not replace, the enforcement provisions of the 1934 Act. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, FCC 96-489 at ¶ 333 (rel. Dec. 24, 1996).

information the Commission needs to render a decision on disputed matters of law or on narrow factual disputes within the limited time specified in the Act.

Respectfully Submitted,

**The Bell Atlantic Telephone
Companies**

By their Attorney


Lawrence W. Katz

Edward D. Young, III
Michael E. Glover
Of Counsel

1320 North Court House Road
8th Floor
Arlington, Virginia 22201
(703) 974-4862

January 6, 1997

ATTACHMENT

Proposed Rule Language

Proposed changes to § 1.721 (a) should be amended to read as follows:

(8) Certification that each complainant has presented each defendant with a complete written statement of the nature and basis for the complaint and that each defendant has provided each complaint with a written response;

* * *

(10) Copies of, or descriptions by category and location of no more than the twenty most relevant documents, data compilations and tangible things in the complainant's possession, custody or control that are relevant to the disputed facts alleged with particularity in the complaint and have not been previously provided to the defendant(s). The complaint may also include an explanation of why any relevant documents are believed to be confidential;

(11) The name, address and telephone number of no more than five individuals who are most likely to have discoverable information relevant to the disputed facts alleged with particularity in the complaint, identifying the subjects of information;

Proposed changes to § 1.724 should be amended as follows:

(g) The answer should include copies of, or descriptions by category and location of no more than the twenty most relevant documents, data compilations and tangible things in the defendant's possession, custody or control that are relevant to the disputed facts alleged with particularity in the pleadings and have not been previously provided to the complainant(s). The answer may also include an explanation of why any relevant documents are believed to be confidential.

(h) The answer should also list the name, address and telephone number of no more than five individuals who are most likely to have discoverable information relevant to the disputed facts alleged with particularity in the pleadings, identifying the subjects of information.

Proposed changes to § 1.732(b) through (d) should be deleted, and replaced with the following:


(b) Briefs shall be permitted only upon order of the Commission, which order shall specify the date(s) for filing briefs and reply briefs, if any, and any page limitations.

Proposed changes to § 1.733(c) should be amended by adding, after the second sentence thereof:

Immediately after the conclusion of the status conference, at the request of the parties, the Commission will provide meeting space and stenographic assistance to permit the parties to draft the aforementioned proposed order. Commission staff that made the oral rulings will remain available to the parties for consultation and to advise whether the proposed order fairly states the substance of the oral rulings made during the conference. Once the proposed order is formally submitted,

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 1997 a copy of the foregoing "Comments of Bell Atlantic" was served on the parties on the attached list.



Tracey DeVaux

Common Carrier Bureau*
Enforcement Division
Federal Communications Commission
Room 6008
2025 M Street, NW
Washington, DC 20554

ITS, Inc.*
1919 M Street, NW
Room 246
Washington, DC 20554

Anita Cheng*
Federal Communications Commission
Common Carrier Bureau
Enforcement Division
Room 6008
2025 M Street, NW
Washington, DC 20554
(Diskette version)